

INDO AUSTRALIAN PUBLIC POLICY CONFERENCE

NEW DELHI, INDIA 23-24 OCTOBER 1996

SESSION 5

INDIA & AUSTRALIA: A NEGLECTED LEGAL RELATIONSHIP

AND A PLAN OF ACTION

The Hon Justice Michael Kirby AC CMG

Australia

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The Hon Justice Michael Kirby AC CMG*

Australia

INDIA REVISITED

Australian lawyers do not know enough about India. I warrant that the opposite is also true.

I come to India as often as I decently can. I have always held a fascination for India. That feeling led me, as a young

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man, to spend two periods in my life, each of four months, travelling around the sub-continent, from Cape Cormarin in the south to the Himalayas in the north. From Calcutta to Goa. In fact, I have probably seen more of the villages and towns of India than most Indians. I present myself to you as an admirer of this country and its timeless culture.

In June 1996 I was in Ahmadabad where I sat in the presence of the simple spinning wheel and the few earthly possessions of Mahatma Gandhi. It should never be forgotten that Gandhi was trained as a lawyer. In his legal training, he learned of the capacity of law to cherish and protect liberty but also to oppress and subjugate free opinion. His deep insight into the role of law as an instrument for freedom and justice has messages for people in every land, including contemporary India and Australia.

A CULTURE OF NEGLECT

The neglect by Indian and Australian lawyers of each other is as tragic as it is puzzling. It is tragic because it represents a lost opportunity for two common law countries, which are federations, which live by the rule of law, which are governed under democratic, parliamentary constitutions and which, in their different ways, protect fundamental human rights and basic freedoms.

I realise that some use has been made in India of Australian constitutional decisions where the text of the Indian Constitution bears analogies to the earlier Australian Constitution¹. I also realise that, occasionally, decisions of the courts in each of our countries call upon the reasoning of judges in the other². Yet what is surprising is that there is relatively little such use. I say that this is surprising because the language of the law in each country (or at least of the superior courts and of the law reports) is the English language. The similarities of our federal constitutions and common law techniques are sufficient to present many potentially fruitful analogies. Our jurists meet each other in international legal conferences. They generally respect what they observe because of the substantial similarity of the professional traditions which we share. The terminology and even the statutory lineage of large areas of public and private law are so similar, at times identical, that they invite useful comparisons. For a time, we even shared, in the Judicial Committee of the Privy Council, a common apex to our respective judicial and legal systems. To this day it is not

1 H R Khanna, *The Making of India's Constitution*, Eastern Book Co, Lucknow, 1981. Several provisions of the Constitution are the same. Compare eg s 105 of the Indian Constitution with s 49 of the Australian Constitution.

2 A recent interesting example is the use of early Indian decisions in the Australian case on so-called Aboriginal Native Title: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 36.

uncommon (especially in matters of criminal law) to hear the advice of that Imperial juridical tribunal, in Indian appeals, read in Australian courts.

Yet for all this, the use made of Indian judicial decisions and legal innovations in Australia is comparatively small. The reverse is equally true. Why should this be so, when we are virtual neighbours across the Indian Ocean? When you are the most populous common law nation on earth, with many lessons to give? Why should it be so where each of us cherishes the integrity and professional ability of the judges of our highest courts?

In part, the answer to my questions lies in the way lawyers go about their daily work. Problems present themselves. Lawyers must quickly find solutions. In India you have the treasury not only of the Supreme Court but, as in the United States, of many distinguished State courts working in areas of the law of immediate national and general concern. Why should you bother to look into the legal system of another country when there are so many riches at home?

In Australia, the explanation is a little different. Until 1986, the Judicial Committee of the Privy Council remained part of the Australian court hierarchy. It was only in that year, by the *Australia Acts*, that the last line of appeal to the Privy Council, from State Supreme Courts was terminated³. Although appeals from Federal courts and the High Court of Australia came to an end a decade earlier⁴, the residual and parallel right to appeal to a court outside Australia, sitting in London, continued the link, long established in the minds of most Australian lawyers, between the law of Australia and the current law expounded in England. Once that link was finally severed, there has been a significant change both in the content of Australian law, as found by the courts, and in the techniques by which the courts find the law. In a sense, as you earlier discovered in India, the obligation to find the law entirely within your own country encourages a measure of creativity which will not tend to occur so long as the legal system is answerable to judges from abroad. Self-reliance also creates a greater sense of responsibility for the content of the law, to ensure that it is appropriate to the society and people whom the law must serve.

3 *Australia Act* 1986 (Aust), s 11(1).

4 *Privy Council (Limitation of Appeals) Act* 1968 (Aust); *Privy Council (Appeals from the High Court) Act* 1975 (Cth). See also *Kirmani v Captain Cook Cruises Pty Ltd [No 2]*; *Ex parte Attorney-General (Qld)* (1985) 159 CLR 461.

Because, as a lawyer, I grew up in an Australian legal system still answerable to the Privy Council in London, it was a commonplace for judges and practising lawyers throughout Australia, including myself, to have on their shelves not only the law books of Australian courts but also the case books from England. So long as our courts were accountable to the Privy Council, it was imperative that we should be aware of the developments of legal principle in, and thinking of, those courts. To this day, in most judicial and Bar chambers in Australia may be found copies of the *Appeal Cases*, the *Weekly Law Reports*, the *All England Law Reports* and English textbooks and digests. Although the line of appeal to the Privy Council has finished forever, the English casebooks and case citations remain.

In part, this is because judges and lawyers are creatures of habit. Once the casebooks are on the shelf, the difficult thing to do is to cancel the subscription. It is easier to maintain the congenial habits of a lifetime. Furthermore, the English reports remain a wonderful source of comparative law material. In a very real way, the link of the Australian legal system, which serves a comparatively small population of nearly 20 million people, to that of England ensured that Australian law developed,

in the early period of nationhood, with the stimulus and direct contribution of one of the great legal systems of the world⁵. I have no doubt that the Indian legal system is likewise indebted to that of England. But for constitutional and other reasons, and because it long ago severed its link with the Privy Council, India has been more eclectic in its use of legal decisions from other places.

Now, Australia is proving the same. But it was not always so.

WORKING AT THE LINKS

Soon after my appointment as President of the New South Wales Court of Appeal (the busiest appellate court in Australia) I struck a blow for creative links between the Australian and Indian legal systems. The case was *Osmond v Public Service Board of New South Wales*⁶. The question was whether the common law in Australia had advanced to the point that a recipient of statutory power would be obliged, when asked, to state reasons for an exercise of that power affecting the

5 F C Hutley, "The Legal Traditions of Australia as Contrasted with Those of the United States" (1981) 55 ALJ 63 at 69.

6 [1984] 3 NSWLR 447 (CA).

interests of the person requesting the reasons. The common law in Australia had certainly advanced to the point that judicial officers were required to give reasons⁷. But there was English authority to the effect that administrators were not so required⁸. Courts repeatedly said that giving reasons was good administrative policy⁹. But they would not support their pious statements with judicial orders.

In the course of my opinion in which I upheld the right to reasons, I invoked developments in the United States of America, Canada, New Zealand, Fiji and other common law jurisdictions. I then turned to India¹⁰:

"In India, the Supreme Court of India has elaborated, in a series of recent cases, a general requirement for administrative tribunals to give reasons for their decisions. Sometimes the requirements have been founded on the 'elementary requirements' of a 'quasi judicial process' (see eg *Vedachala Mudaliar v State of Madras* 39 AIR 1952 Mad 276 at 280; *Commissioner of Income Tax, Bombay v Walchand and Co (Put) Ltd* AIR 1967 SC 1435); sometimes in the Indian Constitution special leave to appeal to the Supreme Court (see eg *Mahavir Prasad v State of*

7 *Pettitt v Dunkley* [1971] 1 NSWLR 376 (CA).

8 *R v Gaming Board for Great Britain; Ex parte Benaim* [1970] 2 QB 417 (CA).

9 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at 190-191.

10 *Ibid*, at 461.

Uttar Pradesh AIR 170 SC 1302; *Harinagar Sugar Mills Ltd v Shyam Sunder* AIR 1961 SC 1669; *Bhagat Raja v Union of India* AIR 1967 SC 1606); sometimes in the review and supervisory jurisdiction of the State High Courts (see eg *Ragnath v Daulatarao* AIR 1975 SC 2146); sometimes in the rule of law (see eg *Mahavir Prasad v State of Uttar Pradesh* (at 1304); and more recently in the principles of natural justice.

The use of the principles of natural justice derived from the common law of England, as a basis for the requirement to state reasons, has received its most notable support in two recent decisions of the Supreme Court of India in which the leading judgments were given by Bhagwati J, namely *Siemens Engineering and Manufacturing Co of India Ltd v Union of India* AIR 1976 SC 11785 and *Maneka Gandhi v Union of India* AIR 1978 SC 597.

In *Siemens* Bhagwati J said that the rule requiring reasons to be given was 'like the principle of *audi alteram partem*, a place of principle and natural justice' (at 1789). The role of 'natural justice' in administrative law is an important principle intended to 'invest law with fairness and to secure justice' was stressed by Bhagwati J in *Maneka Gandhi v Union of India* (at 625). Calling on the language of Lord Morris of Borth-y-gest in *Wiseman v Borneman* [1971] AC 297 at 302, Bhagwati J suggested that the 'soul of natural justice is "fair play in action" and that it why it has received the widest recognition throughout the democratic world'. In that case the Supreme Court of India held that the Passport Authority was obliged to supply reasons for impounding the passport of Mrs Maneka Gandhi. The case is complicated by reference to the Indian Constitution and various statutory provisions. However, the basis for the obligation to provide reasons would appear to have been expressed to lie in the duties of or akin to those imposed in this country by the rules of natural justice."

In the Court of Appeal, Justice Priestley agreed with the result favoured by me. Justice Glass dissented. The High Court of Australia granted special leave to appeal. On the appeal there was barely disguised impatience with my citation of so much

foreign authority. Gibbs CJ expressed his opinion on the Indian cases thus¹¹:

"Kirby P referred to a line of Indian decisions in which it has been held to be 'settled law' that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes." *Siemens Engineering and Manufacturing Co of India Ltd v Union of India*¹². This, it was there said, is a 'basic principle of natural justice. These decisions appear to state the common law in India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes. ... When the rules of the common law of Australia are unclear or uncertain assistance may be gained from a consideration of the decisions of other jurisdictions, but when the rules are clear and settled, they ought not to be disturbed because the common law of other countries may have developed differently in a different context. If the common law of India ... requires reasons to be given for administrative decisions, it is different from that of Australia."

The High Court of Australia reversed the majority decision of the Court of Appeal. In Australia, the common law does not require officials to give reasons for their decisions.

My purpose is not to dwell on the detail of the particular case or the sting of reversal which, occasionally administered,

11 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 668.

12 (1976) 63 AIR (SC) 1785 at 1789.

may be good for the judicial soul. High authority of Indian courts and other courts of the common law world (indeed, if relevant, of civil law courts and international tribunals) would probably now be considered in the High Court of Australia greater detail in a case involving questions of general legal principle. Endeavouring to unlock the legal mind from the capture of the English casebooks and to release Australian lawyers from the long-held connection with English legal doctrine has been a major contribution of the High Court of Australia in recent years. In *Cook v Cook*¹³, the High Court, in the year of the final severance of the formal link between the Australian judicial system and the Privy Council, marked out the new regime. Commenting that the court under appeal in that case had declined to follow judicial comments of two of the foremost Justices of the High Court of Australia (Latham CJ and Dixon J) whilst regarding itself as "constrained to accept the reasoning of the majority of the English Court of Appeal", the High Court of Australia said¹⁴:

"Whatever may have been the justification for such statements in times where the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal to this country, those statements should no longer be seen as binding upon Australian courts. The history of this country and of the common law makes it inevitable

¹³ (1986) 162 CLR 376.

¹⁴ *Ibid*, at 39 per Mason, Wilson, Deane and Dawson JJ.

and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts, just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning."

In the consequence of this stance, the High Court of Australia has become distinctly more eclectic. It is now not uncommon to have cited case decisions from many jurisdictions of the common law and far beyond. In a decision of the Court handed down earlier this month¹⁵, in an appeal involving the Convention on International Child Abduction, the Court made copious reference to decisions in jurisdictions as far from our ordinary legal traditions as Sweden, Germany, Israel, Argentina and Switzerland, as well as the more traditional sources of England, Scotland, Ireland, Canada, New Zealand and the United States of America.

The advent of technology has presented many global and transnational legal problems. These range from child abduction to international business disputes and common problems in the

¹⁵ *DeL v DeL*, High Court of Australia, unreported, 10 October 1996.

field of human rights. Technology can also rescue us from imprisonment in the English and Australian casebooks which still line the shelves of most lawyers' offices. Now, on line legal services provide ready means to capture the most up to date and specifically relevant material from jurisdictions which once would, for practical purposes, have been inaccessible. Lawyers cannot be expected, under the constraints within which they usually operate, to become masters of the law in a multitude of foreign jurisdiction other than their own. However, the common problem which courts today face and the global similarity of many legal issues require of us all, especially in the higher judiciary, an open-minded attitude to the assistance which we may receive from each other. That assistance may be comparatively rare between countries such as Australia or India and Argentina. The legal traditions are so different. But as between India and Australia there are so many links of concept and legal theory that we owe it to each other to become more familiar with relevant fields of jurisprudence so that we may take advantage of the experience which each has to offer.

LAW REFORM AND LEGAL CREATIVITY

Coinciding with the termination of appeals to a court outside the Australian legal hierarchy has been a remarkable period of law reform and legal renewal in Australia. It is worth mentioning this in the present context because, even a superficial knowledge of the developments of the law in India

demonstrates that India is also going through a period of considerable creativity in the law, some of it originating in the Supreme Court.

In 1981 the Supreme Court of India held that the right of an indigent person to receive legal assistance was a fundamental human right which the courts would uphold¹⁶. In Australia, although the courts have not gone so far, it has been held (reversing earlier authority¹⁷) that a court of trial may stay the trial of a person unable to afford legal representation where, if the trial were to be forced to proceed with the accused unrepresented, the result would be an unfair trial¹⁸. Clearly, each of these decisions has considerable significance for the operation of the courts and for the budgets provided by the legislation for legal assistance. The tradition of adversary trial, which Australia and India have inherited from England, posits, for its effectiveness, at least in complex and serious cases, that parties will have access to accurate legal advice and skilled legal representation. The full extent of enforceable access to legal representation in Australia is still being worked out¹⁹. Whether

16 *Khatri v State of Bihar* 1981(1) SCC 627.

17 *McInnis v The Queen* (1979) 143 CLR 575.

18 *Dietrich v The Queen* (1992) 177 CLR 292.

19 cf. *New South Wales v Canellis* (1994) 181 CLR 309.

the principle applies to an appeal against conviction after trial has not yet been determined. How it could be enforced where the remedy of stay is not available is likewise left to conjecture. But it is plain that Indian and Australian courts, at the highest level, are unwilling to condone, or participate in, a charade of justice in which there is an appearance of a fair trial but the reality is lacking.

The Supreme Court of India in *S P Gupta v Union of India*²⁰ took a strong stand to ensure judicial redress to any person claiming legal injury or to a determinate class of persons who, by reason of poverty, helplessness, social or economically disadvantaged position or disability were unable to approach the Court for relief. In such a case it was held that any member of the public, acting bona fide and not for oblique considerations, could maintain an action on their behalf. This *amicus* could seek judicial redress for the legal wrong or injury caused to such a person or determinate class of persons²¹. Although Australian law has not gone as far as this on the issue of standing, it has

²⁰ 1981 (Supp) SCC 87.

²¹ S J Sorabjee, "Public Interest Litigation for Protection and Promotion of Human Rights: The Indian Experience" in 1996 *New Zealand Law Conference Proceedings* 40-48 at 41.

undoubtedly advanced in recent years²². Proposals for further reform have been made by the Australian Law Reform Commission²³.

The development of the common law on standing is an area in which I believe Australian courts, like those of many other lands of the common law, have lessons to learn from India. The sheer complexity of social and economic problems in India, and the common disability of the other branches of government, have caused people to seek redress in the judicial branch. In a series of creative decisions, the Supreme Court of India has responded in a positive and effective way. Whilst judges must beware of claiming expertise and performing functions outside those proper to the judicial role²⁴, that role is itself not frozen in time. Nor is it determined for us, forever, by the traditions of the English judiciary. Carefully and thoughtfully the judicial role may be adapted to new needs, as the Supreme Court of India has

22 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 38, 46, 57; H Burmester, "Locus Standi in Constitutional Litigation" in H Lee and G Winterton, *Australian Constitutional Perspectives*, 1992 at 180 cited *Lindon v The Commonwealth [No 2]* (1996) 70 ALJR 541 (HC) at 547.

23 [1995] *Reform** at 35. (* *Reform* is the Journal of the Australian Law Reform Commission).

24 cf *Wilson v The Commonwealth*, High Court of Australia, unreported, 6 September 1996.

perceived. This is an area of the jurisprudence of India which, I believe, could be studied with advantage in my own country.

One relevant reform task which is of interest in Australia has lately been assigned to the Australian Law Reform Commission. The Commission has been asked to examine the adversarial system of litigation in Australia with respect to administrative law, family law and civil litigation proceedings in courts and tribunals exercising federal jurisdiction. The terms of reference to the Commission exclude analysis of criminal proceedings where the accusatorial trial is deeply entrenched. Constitutional questions may arise in any attempts to change the basic system in Australia, about which I must express no opinion. However, because India and Australia share the adversarial tradition it may be of interest for you to know of this inquiry.

In reality, pure adversarial and inquisitorial systems are now hard to find. Most jurisdictions have a mixture of the two techniques. Some features of the inquisitorial system have become grafted onto court systems in Australia, such that proactive judges are much more vigorously controlling, and directing, the efficient resolution of cases. In Italy, which is predominantly an inquisitorial system, aspects of the adversarial system have lately been introduced into the procedures of criminal trials. One study discovered that passive defence lawyers and bureaucratic prosecutors of the civil law tradition

were culturally ill-suited to the new adversarial contest. They were not disposed to fight cases nor motivated to seek their efficient resolution. I suspect that this is not a problem for Indian or Australian advocates. Nonetheless, in Federal and State jurisdictions, and in a myriad of tribunals in Australia, new procedures have been introduced, in the nature of "case management" to enhance court control over litigation. The parties no longer set the pace and dictate the procedural steps of litigation. This languid approach of the past has tended to clog the courts and reduce efficiency.

Another innovation in Australia has been the training of judges. This is an example of the borrowing which is occurring from the traditions of the civil law. In the French legal system, for example, judges graduate from the National School for Judges into a career structure²⁵. They are not chosen, as judges in Australia and India are, from the ranks of independent senior practising lawyers. In the complex world of the modern courtroom, it is now regarded as imperative to give the new judicial officer training in a wide range of subjects which may be required in judicial life and of which the new judge may have little experience. The training will encompass fields of new

25 D Kinley in [1996] *Reform* at 40.

legislation (such as for redress of discrimination), new ideas (such as gender sensitivity), new legal topics (such as the impact of HIV/AIDS on the law)²⁶ and old problems which we are only now facing up to (such as stress and its impact on judicial life). I have myself lectured in the Australian judicial course on the topic of judicial stress²⁷. It made the audience squirm a bit. But when they got used to speaking honestly and openly about the problem of stress, its importance for judicial life was candidly acknowledged.

Australia, like India, has a most creative and professional law reform system. Most law reform in Australia is achieved through the political process, ie through the initiatives of government and the public service. It is in this way that we have lately secured important statutory reforms: a new national *Corporations Law*²⁸, products liability²⁹, the rights of Aboriginal Australians³⁰, the redress of gender bias in the law³¹, to name

26 M D Kirby, "The Role of the Judiciary and HIV Law" in D C Jayasuriya (ed) *HIV Law, Ethics and Human Rights - Text and Materials*, UNDP, Delhi, 1995.

27 M D Kirby, "Judicial Stress" (1995) 13 *Aust Bar Rev* 101.

28 [1991] *Reform* at 15; [1992] *Reform* at 27; [1993] *Reform* at 6.

29 [1991] *Reform* at 105.

30 [1991] *Reform* at 94.

but a few. Other important reforms have been secured through the work of the institutional law reform bodies, federal and State. The Australian Law Reform Commission, which at one time I chaired, is working on a wide range of topics extending from the inquiry into the adversarial system (just mentioned), through the impact of law upon children and young persons, a reconsideration of the handling of complaints against Federal Police, a review of the law on cross-border civil remedies, a consideration of the law on exchange traded derivatives, a review of the *Freedom of Information Act* 1982 (Aust), a consideration of federal laws on disability services and, finally, completion on the review of the law of standing. State Law Reform Commissions in Australia are working on topics ranging from the reform of sentencing law, the law affecting intellectual disability, defamation law, uniform succession laws, consent to medical treatment for young people, review of the law of evidence to such basic problems as pawnbrokers legislation and review of the *Justices Act*.

Whilst most legal reform comes, as it should in a democracy, from elected law-makers, the courts have also played a role in the modernisation of Australian law. Particularly since 1986, the High Court of Australia has been prepared,

31 [1993] *Reform* at 3, 18.

where appropriate, to take bold steps in the reform of the law by the use of judicial techniques. Probably the best known of these steps was the Court's decision in *Mabo v Queensland [No 2]*³². In that case, the High Court held that the rights to land of Aboriginal Australians and Torres Strait Islanders survived the acquisition of sovereignty over Australia by the Crown. Previously it had been thought that the acquisition of sovereignty had destroyed so-called native title rights. But the Court exploded this theory. As a result, the Australian Parliament enacted the *Native Title Act* 1993 (Aust) which affords procedures whereby Australia's indigenous people may make claims to native title.

There have been many other bold strokes by the High Court; but none as bold as this. In the field of criminal law the decision in *McKinney v The Queen*³³ may be noted. It laid down new rules for the admissibility of uncorroborated and unconfirmed testimony by police and like officials. The rules were designed to reduce the risk of oppression and of conviction of accused persons on false evidence.

32 (1992) 175 CLR 1.

33 *McKinney v The Queen* (1991) 171 CLR 468.

The *Criminal Law Journal* in Australia has urged comparative law analysis of Indian court decisions on criminal law³⁴. The editors point out that the Indian *Penal Code* was adopted in other countries of the region, such as Burma, Sri Lanka, Malaysia and Singapore. Some of its notions have lessons for criminal law in Australia, particularly in those States which have adopted a Code³⁵:

"We therefore encourage Australian law reform bodies and, indeed, our judges, to refer to the Indian Penal Code as a possible model for the reform of substantive criminal law. ... Such a move would also signal to our Asian neighbours that, in fundamental respects, our views about justice, right and wrong, crime and punishment are much the same. This in turn could foster shared ways of thinking about and dealing with crime"³⁶.

One area of the law where the Supreme Court of India has recently examined a broad band of jurisprudence in other common law countries concerns the law of defamation and

34 (1996) 20 *Crim LJ* at 125.

35 M Sornarajah, "Duress and Murder in Commonwealth Law" (1981) 30 *International and Comparative Law Quarterly* at 660; M Cheang, "The Insanity Defence in Singapore" (1985) 14 *Anglo-American Law Rev* at 245; G Peiris, "Involuntary Manslaughter in Commonwealth Law" (1985) 5 *Legal Studies* at 21; S Yeo, "Lessons on Provocation from the Indian Penal Code" (1992) 41 *International and Comparative Law Quarterly* at 612.

36 Editorial, "Reform in the Criminal Law: Looking East" (1996) 20 *Crim LJ* 125 at 126.

privacy. I refer to *R Rajagopal v State of Tamil Nadu*³⁷. This decision is interesting because it held that a local government authority, like other organs or institutions exercising governmental power, could not maintain a suit for damages for defamation. A similar problem had been presented to me in the Court of Appeal in *Ballina Shire Council v Ringland*³⁸. Like Justice Jeevan Reddy, I had access to English decisions relevant to the point³⁹. But he does not appear to have been referred to the decision of the Appellate Division in South Africa in *Die Spoorbond v South African Railways*⁴⁰ to the same effect. I was not referred to the Indian decision although it would have been most helpful. It is always extremely useful, in matters of basic principle, to have the reassurance of consistent approaches in basic questions of this kind.

The second important feature of *Rajagopal's Case* arises from the use made of implications derived from the Indian Constitution. The Court found that the right to privacy was implicit in the right to life and liberty guaranteed by Article 21 of

37 (1994) 6 SCC 632.

38 (1994) 33 NSWLR 640 (CA).

39 See eg *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 referred to *ibid*, 646.

40 (1946) AD 999 (SAAD).

the Indian Constitution⁴¹. In Australia, the High Court has recently derived implications of a constitutional freedom of communication on matters relevant to political, economic and like concerns⁴² although such rights are not spelt out expressly in the text of the Constitution. Like the Indian Supreme Court, the High Court of Australia has been concerned to perform its function with a full awareness of the developments of constitutional principle in other common law countries. This is the approach which Justice Jeevan Reddy adopted in *Rajagopal*. I do not doubt that it will continue to be the approach adopted in Australia. This does not mean blindly following constitutional authority in other countries. The texts are different. The societies in which the law must operate are different. But, in matters of fundamentals, it is usually helpful to have one's own thinking illuminated by the writing found in the opinions of the highest courts of other nations, particularly those which share

41 (1994) 6 SCC 632 at 639.

42 *Theophanous v The Herald and Weekly Times Ltd and Anor* (1994) 182 CLR 104 and cases there cited. For commentary see J Miller, "The End of Freedom, Method in *Theophanous*" (1996) 1 *Newcastle L Rev* 39; H P Lee, "The Australian High Court and Implied Fundamental Guarantees" [1993] *Public Law* 606; A Fraser, "False Hopes: Implied Rights and Popular Sovereignty" (1994) 16 *Sydney Law Rev* 213; W Rich, "Approaches to Constitutional Interpretation in Australia: An American Perspective" (1993) 12 *Uni of Tas Law Rev* 150; T Jones, "Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?" (1994) 22 *Fed L Rev* 57.

the same legal tradition. The way in which those courts grapple with difficult problems will surely help to illuminate the path for those that come later.

A PLAN OF ACTION

What can we do to improve the awareness in India and Australia of each other's laws? How do we break the spell of ignorance which has created such a gulf between two neighbouring countries with such similar legal systems? How do we build the links which will not only reinforce a natural association between our two countries in this area but also facilitate business and economic contacts, dependent on law?

I propose at least ten steps which could be taken without a great deal of cost:

1. *Visits:* There should be more visits and lecture tours by leading Indian and Australian jurists to each other's country. The Australia India Council has begun this process. It has arranged for me to return to India in January 1997 to give lectures in New Delhi, Bombay and Bangalore. Through the good offices of my friend, and colleague in the International Commission of Jurists, Mr Fali Nariman, the Bar Association of India has invited me to deliver these lectures in its annual series. The Australian legal profession should reciprocate. It is hoped

that the Chief Justice of India, or a Justice of the Supreme Court of India, will, later in the year, give lectures in Australia. There have been established legal links between India and lawyers from the United Kingdom and the United States. We should explore the creation of such links between India and Australia.

2. ***Professional bodies:*** There should be more contact between the professional bodies in India and Australia. Already, individual practitioners are linked through the association known as Lawasia. The thirtieth anniversary of that body was recently celebrated in Canberra, Australia. The keynote speaker, suitably enough, was Justice Krishna Iyer of India. He, and a group of jurists (including from India) visited Chief Justice Brennan and me in the High Court in Canberra. Such contacts could be put on a more routine and permanent basis. But this would require initiatives from the professional bodies of the legal profession themselves. It would necessitate an interest to explore each other's legal systems. A contribution could be made by governments, by simplifying visa requirements. I have discovered that visas to enter India are expensive. They are given for a limited duration only. The same is doubtless true of visas to enter Australia. It may be hoped that this will change.

3. ***Publications:*** The libraries of the Supreme Court of India and the High Court of Australia carry ample material from each other's jurisdiction. But it would be no bad thing if the Australian Government were to fund subscriptions of the *Australian Law Journal* to be deposited in the High Courts around India for circulation to the judges. Only when the judges become aware of the jurisprudence of another country will questions be asked of the profession that will send them searching for relevant analogies and precedents. Subscriptions to legal periodicals are expensive. Back issues are extremely costly. But a few well planted contemporary copies of the general Australian legal review, surveying the scene (as the *Australian Law Journal* does) could bear fruit. It might produce reciprocation. Both India and Australia still look to England for legal material. Yet, in all truth, the constitutional arrangements of Australia are much closer to those of India than are those of England.

4. ***Judicial training:*** Consideration might be given to funding the participation of a newly appointed Indian judge in the orientations and training courses given for Australian judges. Judicial officers from New Zealand and Papua-New Guinea take part in these courses. It could be mutually beneficial to have participation by a new Indian judge. It would help stimulate the thinking of all. It would create friendships which would endure and expand.

5. ***Professional reciprocity:*** As India's economic advancement continues, its importance in the global and regional economies will become more obvious. Similarly, many Australian businesses are now looking for opportunities in the region. Capital markets are increasingly international in operation. With investment comes the need for legal services. Consideration should be given to reciprocity of legal qualifications, at least for limited and specialised practice of law. The old notion that lawyers are prisoners of their admitting jurisdiction must adjust to the need for specialist legal practitioners in connection with transborder transactions. Indian corporations operating in Australia will need Indian legal experts and vice versa. Admitting authorities should become more flexible in the provision of qualified practising rights, to reflect the needs for legal services as their businesses venture beyond local borders.

6. ***Universities:*** It would be a good thing if a Chair of Indian Law were established at one of the Australian Universities. The most natural place for a specialisation in the topic might be in Western Australia where there is a strong Indian community. The physical proximity of India is more keenly appreciated there. As business links increase, the need for Australian jurists to be aware of Indian law, particularly in the fields of commerce and public law, will become apparent. Already some law schools (including at

the University of Sydney and the University of Technology, Sydney) are offering specialised courses in the law of countries of East Asia. Curtin University, with the Indian Ocean Centre which has helped to organise this meeting, might give thought to the establishment of a specialised Chair in Indian Law. Funding for such a proposal should be considered by the Australian Government. Indian Universities already include distinguished jurists who have taught in Australian Law Schools, including Professor Upendra Baxi of the University of New Delhi. As a young tutor at Sydney University, he once taught me!

7. *Scholarships:* Consideration might also be given to increasing the number of scholarships, on a reciprocal basis, by which young lawyers in India and Australia could take courses in universities in each other's country. This would help them to refine their knowledge of the legal system of the other. Comparative law is always useful to a lawyer of our tradition who, throughout life, must argue by analogy. As the universities of Britain and the United States close their doors to, or impose prohibitive costs upon, overseas students, those in the region should explore the potential to meet the desire of young graduates to pursue post-graduate education at a cost which they can afford.

8. **Law schools:** Judges and other senior practitioners should consider accepting appointment as Visiting Professors in Universities in India and Australia. I have been appointed an Honorary Visiting Professor at the National Law School in Bangalore. I have given lectures there in 1995. I hope to return early in 1997. These occasions provide a useful opportunity for dialogue and for learning about major legal trends. Even short-term appointments of this kind are useful. The costs involved are minimal. Within Australia AUSAID should explore such possibilities with Australian universities where the undergraduates could be enriched and stimulated by news of the creative lawyering which occurs in India.

10. **Young lawyers:** The future belongs to the young. There are young lawyers' associations in India and Australia. On my return from Rajasthan earlier this year I took with me the journal of the Young Lawyers' Association of India. I arranged for the Young Lawyers of New South Wales to establish an exchange. For the most part, the lawyers of my generation lacked the imagination to perceive the similarities and advantages which would lie in creating links with jurists in India. They flew over India on their way to England. In truth, their minds were locked into an attitude fixed in colonial times. The law and its institutions have changed. Their minds had not. Today, young lawyers in Australia and India are much more open-minded. They are

aware of regional imperatives and the economic opportunities which they present. The more contact that can be established between young lawyers in India and Australia, the better. A starting point lies in the professional associations and in invitations offered to key players who will take back the message of the many similarities that exist between our respective approaches to the law.

Two countries sharing so many historical, linguistic, constitutional and legal links, such as Australia and India, should have more connection than they have. The Indian stereotype of Australia is probably as false as the Australian stereotype of India. The time has come, on the brink of a new millennium, to shatter the stereotypes and to forge a strong new relationship of neighbourliness and mutual awareness. It does not require much for us to achieve it. But will lawyers have the imagination to seize the chance of new horizons?